STATE OF MICHIGAN

COURT OF APPEALS

In re A. GROVES, Minor.

UNPUBLISHED
February 11, 2021

No. 354216
Arenac Circuit Court
Family Division
LC No. 18-014040-NA

In re I. TWAROZYNSKI, Minor.

No. 354217
Arenac Circuit Court
Family Division
LC No. 18-014044-NA

Before: FORT HOOD, P.J., and GADOLA and LETICA, JJ.

PER CURIAM.

In these consolidated appeals,[1] respondent-mother appeals as of right orders terminating her parental rights to the minor children, AG and IT, pursuant to MCL 712A.19b(3)(c)(*i*) (conditions leading to adjudication continue to exist), (c)(*ii*) (other conditions causing children to come within court's jurisdiction), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood of harm if returned to parent's home). Respondent challenges the trial court's findings under the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. We affirm.

Children's Protective Services (CPS) became involved with respondent, her children, and their fathers after the police were repeatedly called to intervene in domestic altercations between

[1] *In re A Groves Minor*, unpublished order of the Court of Appeals, entered August 27, 2020 (Docket Nos. 354216 and 354217).

respondent and Matthew Groves.[2] On the basis of admissions from respondent and Groves, the court found active and reasonable efforts to avoid removal and statutory grounds for adjudication. Although respondent agreed to participate in services, she demonstrated reluctance to meaningfully participate in some aspects of her parent-agency treatment plan. She also continued her involvement with Groves on an on-and-off basis, leading to further instances of domestic altercations. The record suggests that they ended their relationship after a final violent dispute in October 2019, but continued to communicate with one another for some time after that. Groves returned to jail in December 2019, where he remained through the remainder of these proceedings. A supplemental petition seeking termination of respondent's parental rights was filed in February 2020, and the trial court terminated respondent's parental rights in June 2020. The trial court's oral ruling included the following:

> The Court further finds that reasonable efforts were made to preserve and unify the family to make it possible for the children to safely return to the children's home. Those efforts were unsuccessful.
>
> Finally I find that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of this, which is an Indian family because the children are both Indian children. These efforts have been proved unsuccessful and there is evidence beyond a reasonable doubt, including the qualified expert witness testimony that was taken today, that continued custody of the children by the parent will likely result in serious emotional or physical damage to the children.

I. STANDARDS OF REVIEW

We review the trial court's factual findings for clear error, but legal issues regarding the interpretation or application of relevant statutes are reviewed de novo. *In re Beers*, 325 Mich App 653, 680; 926 NW2d 832 (2018). This Court will not find clear error unless it is left with a definite and firm conviction that the trial court made a mistake. *In re England*, 314 Mich App 245, 254; 887 NW2d 10 (2016).

II. ACTIVE EFFORTS

Respondent first challenges the trial court's finding regarding active efforts under MIFPA. We find no merit in this claim of error.

MIFPA was adopted to "establish state law standards for child welfare and adoption proceedings involving Indian children." *In re Williams*, 501 Mich 289, 298; 915 NW2d 328 (2018). The Legislature crafted MIFPA to "prevent removal of Indian children or, if removal is necessary, to place an Indian child in an environment that reflects the unique values of the child's tribal culture." *In re Beers*, 325 Mich App at 661. To that end, § 15(3) provides:

[2] Groves was also named as a respondent in this case. He voluntarily released his parental rights in January 2020 and is not involved in this appeal.

> A party seeking a termination of parental rights to an Indian child under state law must demonstrate to the court's satisfaction that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the active efforts were unsuccessful. [MCL 712B.15(3).]

See also MCR 3.977(G)(1).[3] As this Court has explained before:

> For purposes of . . . MIFPA, active efforts must be proved by clear and convincing evidence. *England*, 314 Mich App at 258-259. . . . "[A]ctive efforts" are defined as "actions to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to reunify the Indian child with the Indian family." MCL 712B.3(a); see also MCR 3.002(1). "Active efforts" require affirmative, as opposed to passive, efforts, and "active efforts" require more than the standard "reasonable efforts" approach. *In re JL*, 483 Mich 300, 321; 770 NW2d 853 (2009). "Active efforts require more than a referral to a service without actively engaging the Indian child and family." MCL 712B.3(a); MCR 3.002(1). "Active efforts" involve a caseworker who takes a client through the steps of a treatment plan rather than requiring the client to perform the plan on his or her own. *In re JL*, 483 Mich at 321. [*In re Beers*, 325 Mich App at 680.]

Respondent argues that the trial court's active efforts finding was clearly erroneous because the testimony offered by Heidi Nesberg, the tribal expert, at the termination hearing was brief, involved unexplained acquiescence to petitioner's findings and actions, and did not address several of the components required for active efforts as defined by MCR 3.002. The respondent in *In re Beers* presented a similar argument premised in the statutory requirements of MCL 712B.3, which mirror the court rule language cited by respondent in this case. *Id*. at 678-679. This Court was unpersuaded, as there was evidence that the respondent was offered or provided a variety of services and family team meetings were held to address barriers and help the respondent comply with court orders. *Id*. at 681. Additionally, a tribal expert testified that she received regular updates from the petitioner, was able to provide input during the case, and participated in the family team meetings. *Id*. She also indicated that the respondent failed to take advantage of the few services that were available through the tribe. *Id*. The Court also noted that the respondent was resistant or uncooperative throughout the case and refused to acknowledge Groves's drug abuse problem that lay at the heart of the child protective proceedings. *Id*.

Much of the same rationale supports the trial court's ruling in this case. Petitioner identified several barriers to reunification early in this case, namely, respondent's mental health, unhealthy romantic relationships, housing, and employment. Respondent was referred to counseling, where her counselor tried to assist respondent with emotional regulation and anger management. Respondent did not meaningfully engage in counseling until after petitioner sought termination of her parental rights, more than a year after the case began, and she was only

[3] MCR 3.977 has been amended since the termination of respondent's parental rights, but the relevant language remains unchanged.

minimally compliant with the medications that were prescribed by the counselor's behavioral health practice.

The record is replete with examples of the domestic altercations between respondent and Groves, with peaceful periods usually coinciding with the periods when Groves was incarcerated. Respondent and Groves were encouraged to go to couple's counseling, but respondent "had issues with what [petitioner was] trying to have them work on as a couple . . . ." The trial court shared petitioner's concern that respondent would repeat her pattern of returning to Groves when he is released from jail, despite the negative effect doing so would have on her life and the lives of her children.

The condition of respondent's home vastly improved over the course of the proceedings. Although respondent's grandparents apparently shouldered most of the burden of the repairs, petitioner stepped in to assist respondent with the expense of filling her propane tank when the need arose. Petitioner also offered respondent services that addressed life skills related to housing and budgeting. Most significantly, respondent received one-on-one assistance from a public healthcare nurse and another service provider from Adoption Option in connection with the barriers she faced, including issues ranging from physical and mental health to housing to employment. Petitioner was also responsible for referring respondent to Vantage Plastics, where she found full-time employment at a sufficient wage to meet her needs. Although respondent's employment there did not last, she was at least employed part-time at the time of the termination hearing and had remained in the same position for approximately seven or eight months.

Respondent was not left to her own devices and expected to sink or swim on her terms. She met with a public healthcare nurse weekly to work on any barriers she was struggling with, and the Adoption Option instructor began serving a similar role around the time the public healthcare nurse's services ended. The quarterly case service plans filed with the trial court indicate that regular family team meetings were held and that Nesberg was provided updated reports, invited to participate in family team meetings, and consulted on the children's placement. Nesberg also confirmed that she monitored the case progress throughout these proceedings and was confident that petitioner made active efforts that proved unsuccessful. On this record, the trial court did not clearly err by finding that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the active efforts were unsuccessful.

III. RISK OF SERIOUS EMOTIONAL OR PHYSICAL DAMAGE

Respondent also challenges the trial court's finding that the children would likely suffer serious emotional or physical damage if returned to her care, as required under MIFPA. Again, we are not persuaded that the trial court erred in this regard.

In addition to the active efforts requirement discussed in Part II of this opinion, MIFPA also requires proof beyond a reasonable doubt that continued custody by the parent would likely result in serious emotional or physical damage to the child. *In re England*, 314 Mich App at 253. Specifically, § 15(4) of MIFPA states:

> No termination of parental rights may be ordered in a proceeding described in this section without a determination, supported by evidence beyond a reasonable doubt, including testimony of at least 1 qualified expert witness as described in section 17, that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child. [MCL 712B.15(4).]

See also MCR 3.977(G)(2).

Respondent argues that the trial court's finding regarding this requirement was clearly erroneous because the court referred to a vague evidentiary standard, Nesberg's testimony was so conclusory that it lacked the necessary evidentiary value, and the remaining witnesses did not testify about the possible damage the children would face in respondent's custody. We disagree. Respondent's first point mischaracterizes the record. MIFPA and its federal counterpart require a dual burden of proof. *In re England*, 314 Mich App at 253. "That is, in addition to finding that at least one state statutory ground for termination was proven by clear and convincing evidence, the trial court must also make findings in compliance with . . . [the MIFPA] before terminating parental rights." *Id.* (quotation marks and citation omitted). The trial court began its ruling by addressing the statutory grounds for termination under MCL 712A.19b(3). After addressing each statutory ground alleged in the supplemental petition, it said, "And with respect to those factors, I find them by clear and convincing evidence, in fact I find them, I would find them even by [a] higher standard if need be." The trial court's reference to a "higher standard" than clear and convincing evidence related to the statutory grounds for termination—not any finding required by MIFPA. As it relates to the court's conclusion that the children would suffer serious emotional or physical damage in respondent's custody, the court clearly stated that its finding was based on "evidence beyond a reasonable doubt including the qualified expert witness testimony . . . ." We therefore reject respondent's suggestion that the court did not apply the appropriate evidentiary standard.

Respondent's alternative arguments regarding the sufficiency of the evidence are also without merit. Nesberg testified that the children would be at risk of harm in respondent's care, that she held that opinion beyond a reasonable doubt, and that both she and the tribe's child welfare committee supported termination of respondent's parental rights. We acknowledge that Nesberg's testimony on this point was extremely conclusory, and we would encourage petitioner to create a better developed record in the future. However, "one of the major purposes of the qualified expert witness is to 'speak specifically to the issue of whether continued custody . . . is likely to result in serious physical or emotional damage to the child.' " *In re McCarrick/Lamoreaux*, 307 Mich App 436, 465-466; 861 NW2d 303 (2014), quoting Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed Reg 67584, 67593, § D.4(a) (November 26, 1979). By stipulating to Nesberg's expertise, the parties recognized that she was qualified to speak to this issue. Nesberg was involved with this case since the time of adjudication and listened to all of the evidence presented by petitioner at the termination hearing before presenting her opinion regarding the risk of harm to the children. She was clearly well informed of the details of the case and had sufficient record evidence from which she could reach her opinion, even if she did not specifically identify the factual matters that supported it.

The court's finding regarding the risk of serious emotional of physical damage must be "supported by evidence beyond a reasonable doubt, *including* testimony of at least 1 qualified expert witness . . . ." MCL 712B.15(4) (emphasis added). In interpreting this requirement, this Court has observed that the word "include" means "to contain or encompass as part of a whole," or "[t]o contain as a part of something." *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 60; 874 NW2d 205 (2015) (quotation marks and citations omitted; alternation in original). Given this plain meaning, it is evident that expert testimony must be *part* of the evidence supporting the trial court's finding under MCL 712B.15(4). Conversely, expert testimony need not be the entire evidentiary basis for the court's finding; the balance of the evidence presented by petitioner is also relevant. This is particularly true here because Nesberg first confirmed her knowledge of the case history and petitioner's evidence before offering her conclusory opinion, thereby suggesting that her opinion was premised on the very evidence the court received before Nesberg's testimony.

According to respondent, none of the other witnesses testified that respondent's custody of the children would result in serious emotional or physical damage to the children. Although petitioner's lay witnesses did not specifically express that opinion, it is well settled that reasonable inferences arising from record evidence can be sufficient to establish a fact beyond a reasonable doubt. See *People v Kenny*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 347090); slip op at 5. There was substantial evidence about two matters that directly support the trial court's finding under MCL 712B.15(4): respondent's history of prioritizing unhealthy relationships and her untreated mental health issues.

Respondent admitted that in the months preceding the initial petition in this case, the police were repeatedly called to respond to domestic altercations between herself and Groves. Even if respondent did not independently appreciate the harm the children were exposed to because of these altercations, CPS made the issue clear to her and further explained that Groves should not be around the children while he was actively using drugs. Respondent disregarded these warnings and allowed Groves to return to her home while AG was in her care, leading to yet another domestic altercation and prompting petitioner to initiate these proceedings. The children were removed from respondent's care, which should have signaled the seriousness of the issue to respondent. But even after losing custody, respondent still allowed Groves to live with her when he was released from jail. Another domestic altercation occurred five days later. Respondent separated from Groves for several months in the summer of 2019, but by October 2019, they were spending time together again and found themselves in another serious domestic altercation. By this point, respondent had acknowledged that she could not be in a relationship with Groves if she wanted her children back, yet she still chose to place herself in the same situation, fully appreciating the significance of doing so.

The public healthcare nurse and foster-care worker both worked with respondent for at least a year, and neither witness was convinced that respondent had resolved her problem with engaging in unhealthy relationships. Although there was no evidence that respondent had been in contact with Groves since the beginning of 2020, it is noteworthy that Groves was incarcerated during that time frame, effectively forcing a halt to their relationship and significantly impairing their ability to even communicate with one another. The trial court believed that respondent would not be able to resist the temptation to return to Groves upon his release. Moreover, there was additional evidence that respondent's tendency to engage in unhealthy, volatile relationships was not limited to her relationship with Groves. IT's father had a criminal history and was a registered

sex offender when respondent met him. They, too, were involved in domestic violence on multiple occasions. Given respondent's history, the trial court's concern about her unhealthy relationships was not clearly erroneous. Furthermore, both the court and Nesberg could reasonably infer that respondent would expose the children to a toxic environment in the future if they were returned to her care, which would likely result in serious harm to the children—whether in the form of emotional damage from repeatedly witnessing domestic violence, physical harm if they were caught in the middle of a violent domestic altercation, or both.

Respondent's mental health issues also created a serious risk of harm to the children in her care. Respondent suffered from depression and post-traumatic stress disorder and refused to acknowledge the severity of these conditions or her need for treatment throughout a majority of the case. Despite agreeing to participate in and benefit from mental health services, respondent was inconsistent in her counseling attendance and did not meaningfully engage with her counselor until after petitioner sought termination of her parental rights. Although she made respectable efforts in this regard for approximately 2½ months, this final surge did not negate her long history of denial regarding her mental health struggles and the effect this issue could have on her children. By the time of the termination hearing, respondent's counselor still had serious reservations about respondent's ability to continuously regulate her emotions and remain "present" with the children if they were returned to her full-time care. Under these circumstances, Nesberg and the trial court could reasonably infer that returning the children to respondent would likely result in serious emotional or physical damage. The trial court did not clearly err by concluding that evidence beyond a reasonable doubt, including qualified expert testimony, supported its conclusion.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael F. Gadola
/s/ Anica Letica